No. 96-542

In The

Supreme Court of the United States

OCTOBER TERM, 1996

WALTER McMILLIAN,
Petitioner,

v.

MONROE COUNTY, ALABAMA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE* SUPPORTING PETITIONER

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, NY 10036
(212) 994-9800

Paul C. Saunders, Co-Chair
Marc L. Fleischaker, Co-Chair
Norman Redlich, Trustee
Barbara R. Arnwine
Thomas J. Henderson
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1450 G St., N.W., Suite 400
Washington, DC 20005
(202) 662-8600

Mitchell F. Dolin*
Robert A. Long, Jr.
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, DC 20044-7566
(202) 662-6000

Counsel for the American Civil Liberties Union and the Lawyers' Committee for Civil Rights Under Law

* Counsel of Record

January 1997

29 pp

QUESTION PRESENTED

Whether the sheriff of an Alabama county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983 (1994).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes

Miscellaneous

In The

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-542

WALTER McMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE* SUPPORTING PETITIONER

The American Civil Liberties Union and the Lawyers' Committee for Civil Rights Under Law respectfully submit this brief *amici curiae* in support of the petitioner. Pursuant to Rule 37, all parties before this Court have consented to the filing of this brief.

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and defending constitutional rights. The ACLU has appeared before this Court, both as counsel for parties and as *amicus curiae*, in numerous cases, including *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995). Because the decision below would substantially curtail the ability of many individuals to obtain meaningful relief for violations of their constitutional rights by law enforcement officials, this case raises issues of significant concern to the ACLU and its members.

The Lawyers' Committee for Civil Rights Under Law is a national civil rights organization that was formed in 1963 by leaders of the American bar at the request of President Kennedy to provide legal representation to African-Americans who were being deprived of their civil rights. The Lawyers' Committee has appeared before this Court, both as counsel for parties and as *amicus curiae*, in numerous cases, including *Swint*. The Lawyers' Committee and its local affiliates have represented thousands of individuals who have brought claims against municipalities under 42 U.S.C. § 1983. Section 1983 is the primary vehicle for the enforcement of the constitutional protection of Equal Protection and Due Process with regard to state and local governments, including deprivations and injuries caused by discrimination on the basis of race, national origin, and gender. A decision affirming the court of appeals ruling could profoundly limit the availability of damage remedies under Section 1983 and the accountability of local governments for constitutional violations.

STATEMENT OF THE CASE

Petitioner Walter McMillian spent nearly six years on Alabama's Death Row. In 1993, the Alabama Court of Criminal Appeals overturned petitioner's capital murder conviction and death sentence, based on its determination that critical evidence corroborating petitioner's claim of innocence had been withheld by government officials. *McMillian v. State*, 616 So.2d 933 (Ala. Cr. App. 1993). The State subsequently dismissed all charges against petitioner and released him from prison. Pet. App. 1a-2a.

Petitioner brought an action under 42 U.S.C. § 1983 (1994) against Monroe County, Alabama, and various government officials involved in his arrest and incarceration, including Thomas Tate, the Sheriff of Monroe County. Petitioner's action seeks damages for violations of his federal constitutional rights, as well as for violations of state law. Pet. App. 2a.

Petitioner contends that Sheriff Tate is a final policymaker for Monroe County in matters of law enforcement, and that the County therefore is liable for the sheriff's official actions under Section 1983. The district court rejected that contention, relying on the Eleventh Circuit's subsequently-vacated decision in *Swint v. City of Wadley*, 5 F.3d 1435, 1450-1451 (11th Cir. 1993), *vacated sub nom. Swint v. Chambers County Comm'n*, 115 S.Ct. 1203 (1995). Pet. App. 2a.

The court of appeals granted petitioner permission to appeal pursuant to 28 U.S.C. § 1292(b), and held that an Alabama sheriff is not a final county policymaker for purposes of § 1983. The court of appeals acknowledged that the sheriff is elected by county voters, the sheriff's law enforcement operations are funded by the county, and that sheriffs exercise final law enforcement authority within their counties. Pet. App. 4a, 15a-16a & n.5. The court of appeals nevertheless

held that sheriffs are not policymakers for the county in matters of law enforcement. Pet. App. 18a.

The court of appeals based its ruling on the reasoning of its vacated decision in *Swint*. The court concluded that Alabama counties have "no law enforcement authority," because "Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 8a. Moreover, the panel below suggested that, while not dispositive, the Alabama Constitution's designation of sheriffs as members of the state executive department weighs heavily against a finding of county liability under § 1983. Pet. App. 12a-13a.

SUMMARY OF ARGUMENT

In Alabama, the county sheriff functions as the final policymaking authority for the county in matters of law enforcement. Under Alabama law, the county elects the sheriff, pays the sheriff and the sheriff's deputies, finances and equips the sheriff's office, and reviews the sheriff's personnel decisions. No state official reviews the sheriff's policy decisions in matters of law enforcement.

The court of appeals' decision would require that the county commission must possess explicit law enforcement authority before the county sheriff's actions would subject the county to § 1983 liability. Pet. App. 14a-15a. This Court's decisions have rejected the notion that final county policy can be made only by legislative bodies. County policy also can be made by *executive* officials, because the power to establish policy is "no more the exclusive province of the legislature at the local level than at the national and state level." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

ARGUMENT

IN ALABAMA, THE SHERIFF FUNCTIONS AS THE FINAL POLICYMAKING AUTHORITY FOR THE COUNTY IN MATTERS OF LAW ENFORCEMENT.

A county is a "person" within the meaning of 42 U.S.C. § 1983 (1994), and therefore is liable for constitutional violations caused by policies or customs adopted by its lawmakers or by "those whose edicts or acts may fairly be said to represent official policy." *Monell v. Department of Social Servs. of New York*, 436 U.S. 658, 659 (1978). A county may be held liable for a single act or decision of an official with final policymaking authority with respect to the matter in question. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). State law, custom and usage must be examined to determine whether a particular official has final policymaking authority. *Praprotnik*, 485 U.S. at 123.[1]

In this case, the court of appeals incorrectly concluded that an Alabama sheriff is not a final county policymaker in matters of law enforcement. The court of appeals' holding rests on two errors. First, the court failed to address the functional question lying at the heart of the Section 1983 final policymaker doctrine: Whether the sheriff in actuality

---

[1] On November 5, 1996, this Court heard oral argument in *Board of County Comm'rs of Bryan County, Oklahoma v. Brown*, No. 95-1100. In *Brown*, the county has stipulated that the sheriff is "the policy maker for [the county] regarding the Sheriff's Department," although it disputes whether the sheriff has "final policymaking authority with respect to employment practices." No. 95-1100 Pet. Br. 19.

functions as a final policymaker for the county and its residents in the area of law enforcement.[2]

Second, the court of appeals assumed without justification that the sheriff's office is distinct from the government of the county. As a consequence, the court incorrectly held that the county cannot be liable under § 1983 for the actions of its sheriff unless the state explicitly has delegated law enforcement authority to county officials other than the sheriff. Pet. App. 8a.

A. Alabama State Law Establishes That The Sheriff Functions As A Policymaker For The County.

The court of appeals relied on a provision of the Alabama Constitution that provides that the executive department of the State includes, in addition to "a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries," "a sheriff for each county." Ala. Const. art. V, § 112. In relying on this provision, the court of appeals overlooked other provisions of Alabama law that designate sheriffs as *county* officials. *See* Ala. Code § 17-2-3 (1996) (providing for the election of a sheriff to a "*County* office[]," along with a "tax assessor and tax collector in each county and one coroner in all counties having a coroner") (emphasis added); *id.* § 36-3-4 (providing that a sheriff, a "*County* officer[]," shall have a four-year elective term of office, as shall "one coroner, members of county commissions, one county treasurer, when elective, and one

---

[2] In deciding related immunity issues, the Court has looked to functional and actual duties rather than formal labels. *See, e.g., Forrester v. White*, 484 U.S. 219, 227 (1988) (distinguishing between judicial and non-judicial functions of judges for purposes of judicial immunity under
§ 1983).

constable for each election precinct . . . .") (emphasis added); *id.* § 36-22-16(a) ("Sheriffs of the several counties . . . shall be compensated . . . by an annual salary payable in equal installments out of the county treasury as the salaries of *other county employees* are paid.") (emphasis added). In any event, as the court of appeals recognized (Pet. App. 13a), the label that a State affixes to an official is not dispositive for § 1983 purposes. The dispositive question -- which the court of appeals neither asked nor answered -- is whether the sheriff *functions* as a final policymaker for the county in matters of law enforcement.

1. Alabama could have chosen to enforce the law exclusively at the state level, but it has chosen instead a system of state and county law enforcement.

Alabama could have chosen to enforce the law exclusively through a state police force. Indeed, the Alabama Code expressly empowers the Governor to "establish and maintain a state highway patrol." Ala. Code § 32-2-20 (1996). The Highway Patrol reports to the Department of Public Safety, whose director is appointed by and "serve[s] at the pleasure of the governor." *Id.* § 32-2-1. The Director of Public Safety is in turn responsible for creating and administering the "highway patrol division" of the Department of Public Safety. *Id.* § 32-2-3. The State Director of Public Safety appoints not only the Chief of the Highway Patrol, but "all other employees," *id.* § 32-2-4, including the state troopers who exercise the full powers of police officials throughout the state, *id.* § 32-2-22.

Alabama could have chosen to enforce the law solely through an expanded version of its State Highway Patrol, with officers paid out of the state treasury, *id.* § 32-2-6, insured by the State, *id.* § 32-2-10, and answering directly to state authority. If Alabama had adopted this law enforcement

structure, the highest-ranking state police officer working at the county level would not be considered a final policymaker for the county.

On the other hand, Alabama also could have chosen to delegate all law enforcement authority to its county commissions. In such a law enforcement structure, the county commissions would be directly responsible under state law for raising a police force and enforcing the law within the boundaries of each county.

In fact, Alabama has established a system that clearly differentiates between state law enforcement authority, which is exercised by the State Highway Patrol, and county law enforcement authority, which is exercised by county sheriffs, who are elected and paid by the county. In such a system, the sheriff clearly functions as the final policymaking authority for the county in the area of law enforcement.

2. State law provides that the sheriff is elected, funded, and supported at the county level, and authorized to enforce the law within the county.

In Alabama, the sheriff is "elected in each county by the qualified electors thereof . . . ." Ala. Const. art. V, § 138. County sheriffs are paid directly by the county out of "the county treasury." Ala. Code § 36-22-16 (1996). The Alabama Supreme Court, when considering whether county sheriffs are state officials with respect to the payment of their salaries, concluded they are *county* officials. *Jefferson County v. Dockerty*, 30 So. 2d 474, 477 (Ala. 1947) ("the sheriff of Jefferson County is *undoubtedly a county officer*") (emphasis added); *In re Opinions of Justices*, 143 So. 345, 345 (Ala. 1932) (sheriffs "are, strictly speaking, county officers" covered by a constitutional amendment that requires county

officers to be paid a salary rather than paid out of commissions and fees).[3]

The county commission is responsible not only for paying the sheriff's salary, but also for financing the operation of the county sheriff's office. By law, the county commission must

> furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office.

Id. § 36-22-18. Counties also provide insurance for the sheriffs and their offices. *See, e.g., First Mercury Syndicate v. Franklin County*, 623 So. 2d 1075, 1075 (Ala. 1993) (county purchases professional liability insurance for sheriff).

The sheriff's hiring and other personnel decisions are subject to review by the *County* Personnel Board. *See, e.g., Fields v. State ex rel. Jones*, 534 So. 2d 615, 616-17 (Ala. Civ. App. 1987) (denial of deputy sheriff's medical leave); *Etowah County Personnel Bd. v. McDowell*, 437 So. 2d 563, 563-64 (Ala. Civ. App. 1983) (termination of deputy sheriff for insubordination); *Freeman v. Purvis*, 400 So. 2d 389, 390 (Ala. 1981) (merit bonus increases for sheriff's deputies).

---

[3] In *Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991), the Alabama Supreme Court held that a sheriff is a state official for purposes of immunity from suit "based on the [Alabama] constitutional provision [art. V, § 112]," that enumerates sheriffs as part of the state executive department. As noted above, however, when the Alabama Supreme Court has not *presumed* the sheriff's status based on the state constitutional provision, but instead has examined his actual *functions* under state law, the Court several times has deemed the sheriff to be a county officer.

Furthermore, sheriffs and their employees are not part of the state civil service, but rather are part of the unclassified civil service of each county. *See* 1994 Ala. Acts 547. Thus, there is no statute that requires the State to pay damages for torts caused by sheriffs in their official capacities. County commissions pay all the bills of the county sheriff's department and are authorized by statute to cover the sheriff's costs in defending tort suits.

County sheriffs and the law enforcement personnel they direct have no jurisdiction to enforce the law beyond the borders of their respective counties. Alabama law expressly provides that:

> It shall be the duty of sheriffs *in their respective counties*, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties* and to present a report of the evidence so secured to the district attorney or assistant district attorney *for the county*.

Ala. Code § 36-22-3 (1996) (emphasis added). No statute provides sheriffs or their deputies with any general authority to enforce the law outside the county in which the sheriff is elected to serve.

In short, under Alabama law each county elects its sheriff, pays its sheriff and the sheriff's deputies, finances and equips its sheriff's office, and reviews its sheriff's personnel decisions.

The State, on the other hand, neither finances nor supervises the sheriff's policies. No state official, including the Governor and the Attorney General, has the power to appoint any sheriff or control the sheriff's development of law enforcement policy within the county. The only method for "disciplining" a sheriff is by judicial impeachment in the

Alabama Supreme Court, which can be instigated only by suit filed by the Attorney General. Ala. Const. art. VII, § 174.[4] This manner of impeachment for sheriffs is the same as for virtually every county official.[5] Moreover, sheriffs may be impeached only for specified causes that do not include adopting law enforcement policies other than those preferred by the Governor or other state officials.[6]

---

[4] Impeachment of a sheriff is "similar to a criminal trial." *Parker v. Amerson*, 519 So. 2d 442, 444 n.1 (Ala. 1987). It differs from the impeachment of the Governor, which requires voting on articles of impeachment by the House of Representatives and a trial by the Senate. Ala. Const. art. VII, § 173.

[5] *See* Ala. Code § 36-11-1(a) (1996):

> The following officers may be impeached and removed from office: judges of circuit and probate courts, district attorneys, judges of the courts of appeals, district judges, sheriffs, clerks of the circuit courts, tax collectors, tax assessors, county treasurers, coroners, notaries public, constables and all other state officers not named in section 173 of the Constitution and all other county officers and mayors and intendants of incorporated cities and towns in this state.

[6] *See* Ala. Code § 36-11-1(b) (1996):

> The officers [listed in § 36-11-1(a)] may be impeached and removed from office for the following causes:
>
> (1) Willful neglect of duty;
>
> (2) Corruption in office;
>
> (3) Incompetency;
>
> (4) Intemperance in the use of intoxicating liquors or narcotics to such an extent in view of the dignity of the office and importance of its duties as unfits the officer for the discharge of such duties; or
>
> (5) Any offense involving moral turpitude while in office or committed under color thereof or connected therewith.

In light of these statutory and judicial mandates, it is plain that, despite the label attached to sheriffs in the Alabama Constitution, the sheriff functions as the final policymaker *for the county* in matters of law enforcement.[7]

3. In Alabama, a county coroner, who is clearly a county official, is statutorily empowered to discharge the duties of the sheriff.

In Alabama, the sheriff's office is analogous to that of the county coroner, except that the Alabama Constitution does not label the county coroner as a member of the State's executive department. A comparison of the offices of the coroner and the sheriff reinforces the conclusion that the sheriff functions as a final county policymaker for purposes of § 1983.

Like the sheriff, the coroner is elected by the qualified voters of the county for a four year term, *see id.* § 11-5-1, and is listed along with the sheriff in certain statutes providing for the election of county officials, *see id.* § 17-2-3 and § 36-3-4. Also like the sheriff, the coroner is empowered under Alabama law to issue subpoenas for witnesses, *id.* § 15-4-3 and § 15-4-4, as well as to issue arrest warrants, *id.* § 15-4-9. The coroner's duties, like the sheriff's, are defined by state law, *see id.* § 11-5-4, and neither the county commission nor any state official has direct authority over the coroner.

---

[7] The conclusion that the sheriff is a final policymaker for the county is in accord with the ordinary meaning of the term "sheriff" as "[t]he chief executive and administrative officer of a county, being chosen by popular election." *Black's Law Dictionary* 1376 (6th ed. 1990). *See also American Heritage Dictionary of the English Language* 1663 (3d ed. 1992) (defining "sheriff" as the "chief law enforcement officer . . . in a U.S. county"); *Webster's New International Dictionary of the English Language* 2311 (2d unab. 1954) (defining "sheriff" as the "chief executive officer of a shire or county, charged with the execution of the laws, the serving of judicial writs and processes, and the preservation of the peace").

Thus the question whether the coroner exercises county authority in Alabama is very similar to the question whether the sheriff exercises county authority. Indeed, Alabama statutorily empowers the county coroner *to discharge the duties of the sheriff*, whenever the sheriff's removal, inability to perform his duties, or interest in a matter so requires. *See id.* § 11-5-5.[8] And under Alabama Code § 11-5-12, a coroner who is discharging the duties of the sheriff steps into the sheriff's shoes for purposes of liability.

As elected county executives who exercise statutorily defined authority within the county, the sheriff and the coroner answer to no higher policymaking official at *either* the county or state level of government.[9] The sheriff and the coroner, whether acting as the coroner or as the sheriff, are both final county policymakers for purposes of Section 1983.

---

[8] Alabama Code § 11-5-5 reads as follows:

> The coroner must discharge the duties of the sheriff:
>
> (1) When the office of sheriff is vacant and until his successor is qualified;
>
> (2) When the sheriff is incompetent to act;
>
> (3) When the sheriff is imprisoned;
>
> (4) In cases to which the sheriff is a party; and
>
> (5) In such cases as he is directed by the judge of probate.

Under Alabama law the coroner also "shall be keeper of the jail when the sheriff is imprisoned." *Id.* § 11-5-6. *See also id.* § 14-6-2 (providing for the administration of the jail in the event of the "death, resignation, removal from office or expiration of term of office of any sheriff, *or of any coroner acting as sheriff* . . . .") (emphasis added).

[9] In one respect, the office of coroner might be deemed as more nearly answerable to the Governor. The Governor is authorized to fill vacancies in the office of the coroner by appointing a person to serve until a successor is elected and qualified. *See id.* § 11-5-2. The Governor has no authority to appoint sheriffs.

B. The Eleventh Circuit's Ruling Permits States To Evade Section 1983 Liability By Selectively Labeling County Policymakers As State Officials.

Affirmance of the Eleventh Circuit's decision would allow States to shield local governments from Section 1983 liability simply by designating local policymakers as state officers. Alabama's Constitution designates an executive department that consists of officers with statewide jurisdiction, with the sole exception of "a sheriff for each county." If the Court, for this reason, were to hold that sheriffs in Alabama are *not* county officials who exercise law enforcement authority for the county, nothing would prevent Alabama or any other State from amending its designation of state officers to include, for example, "a coroner for each county," a "tax assessor for each county," and a "treasurer for each county."

For that matter, Alabama or any other State could similarly designate as state officials a "mayor for each city," "police chief for each city," and "the county commissioners for each county and the city council members for each city." In so doing, Alabama could insulate its counties and cities from Section 1983 liability for the official acts or decisions of virtually all of its officials.

The court of appeals based its decision primarily on its answer to the "threshold question" whether an Alabama sheriff's actions "fall within an area of the local government's business." Pet. App. 8a. Based on its conclusion that Alabama counties have "no law enforcement authority," and that "Alabama law assigns law enforcement authority to sheriffs but not to counties," the court of appeals held that "a sheriff does not exercise county power when he engages in law enforcement activities and, therefore, is not a final policymaker for the county in the area of law enforcement." *Id.*

The Eleventh Circuit's reasoning reflects an unduly restricted view of local governmental structure that ignores the role of local *executive* officials. In addition to the lawmaking actions of county commissions and similar legislative bodies, county policy also is set by a range of executive officials. The Court has made it abundantly clear that counties are liable not only for the official acts of their lawmakers, but also for acts of "*other* officials 'whose acts or edicts may fairly be said to represent official [county] policy.'" *Pembaur*, 475 U.S. at 480 (emphasis added) (quoting *Monell*, 436 U.S. at 694). *Executive* officials may be final policymaking authorities, because "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level." *Pembaur*, 475 U.S. at 480.[10]

---

[10] In its brief opposing certiorari, respondent cites cases holding that Alabama sheriffs are state officials for purposes of the Eleventh Amendment. (Br. in Opp. 25-26, citing, *inter alia*, *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989)). Those cases do not determine the outcome of this case. First, *Parker* expressly states that, "[t]o the extent this claim may be against [a sheriff] as representative of the county," a plaintiff may "sue the county directly" under § 1983. 862 F.2d at 1476 n.4. Second, *Parker* "conducted no analysis of whether the state of Alabama would be liable for judgments entered against county sheriffs but simply assumed that the state would have to pay the claims." *Carr v. City of Florence*, 916 F.2d 1521, 1527 (11th Cir. 1990) (Clark, J., concurring). In fact, counties purchase professional liability insurance for their sheriffs, *see First Mercury Syndicate v. Franklin County*, 623 So. 2d 1075, 1075 (Ala. 1993), and the record in this case suggests that a judgment likely would be paid by the county's self-insurance fund and not by the State. Pet. App. 77a. Third, neither the Governor nor the State legislature has authority to appoint the sheriff or control policymaking in the area of county law enforcement. *Cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (concluding that a school board "is more like a county or city than it is like an arm of the State").

In similar fashion, the court of appeals' ruling would "require[] that [the county] possess power in a particular area" before an official's actions in that area would be attributable to the county. Pet. App. 14a-15a. This amounts to an argument that the county lacks law enforcement authority because the State has never expressly delegated such authority to county *legislators*. But nothing precludes a State from delegating county law enforcement authority exclusively to a county executive officer.

The Eleventh Circuit's approach leads to the implausible conclusion that the sheriff cannot exercise law enforcement authority on behalf of the county unless the county commission is directly involved in law enforcement. This simply cannot be true. In Monroe County, the sheriff decides how to use county resources devoted to law enforcement, subject to the commission's budget decisions, and directs the activities of county employees serving law enforcement functions. Functionally, the sheriff operates as the county's final policymaker in matters of law enforcement.

C. Other Courts of Appeals Have Held Counties Liable For The Official Acts Of County Sheriffs.

Other courts of appeals have found that sheriffs are final county policymakers in the area of law enforcement. The First Circuit, for example, found that a Massachusetts county was liable for a sheriff's Section 1983 violation "because the Sheriff was the county official who was elected by the County's voters to act for them and to exercise the powers created by state law." *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985).

The Fifth Circuit has similarly construed Texas law. A popularly elected sheriff

> hold[s] virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein. . . . [H]is official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.

Turner v. Upton County, 915 F.2d 133, 136 (5th Cir. 1990) (quoting *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (quoting, in turn, *Monell*, 436 U.S. at 694)).

The Sixth Circuit has also held that the county is liable for a sheriff's action, even though the Michigan Constitution explicitly provides that counties do "not make policy for the Sheriff's Department." *Marchese v. Lucas*, 758 F.2d 181, 188 (6th Cir. 1985). In holding the county liable, the court pointed to how Michigan law functions:

> The County, through its Board of Supervisors, appropriates funds and establishes the budget for the Sheriff's Department. The Sheriff is elected by the voters of Wayne County. No doubt he is responsible for enforcing state law and presumably federal law as well. But equally clearly he is not an official of the State of Michigan or of the federal government.

Id. at 189. Courts have thus held counties liable for sheriffs' actions where, as here, counties elect and finance the sheriffs.

Courts also hold counties liable for a sheriff's actions where the sheriff reports to no higher state or county official. The Fifth Circuit found, for example, that an Arkansas sheriff, who has a "statutory duty to perform law enforcement activities in and for the county, is solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers." *Crowder v. Sinyard*, 884 F.2d 804, 828 (5th Cir. 1989) (citation omitted). In these

circumstances, sheriffs are "final policymaking authorit[ies]" and counties are liable for their actions. *Id.* at 829.

In *Davis v. Mason County*, the Ninth Circuit held that a sheriff can be a "final authority" with respect to one policy, even if he or she is not the final authority with respect to other policies. 927 F.2d 1473, 1480-81 (9th Cir. 1991). In Oklahoma, where the sheriff "was responsible for establishing the county's policy regarding the use of force," it was held that the county may be liable for the excessive force used by personnel within the sheriff's office. *Meade v. Grubbs*, 841 F.2d 1512, 1530 (10th Cir. 1988). The Fourth Circuit rejected a county's argument that a sheriff is immune even though state courts have held that sheriffs are state officers. *Dotson v. Chester*, 937 F.2d 920, 926, 927, 932 (4th Cir. 1991) (sheriff is liable under Section 1983 where violation occurred at county-financed jail operated by sheriff even when sheriff is immune for other purposes).[11]

Other than the Eleventh Circuit's decision in *Swint* and the panel's decision below, only one pertinent decision of a court of appeals has declined to find a county liable for the acts of its sheriff. There the court did not consider the functions of the sheriff's office. *Soderbeck v. Burnett County*, 752 F.2d 285, 292 (7th Cir. 1985) (county sheriff held not a

---

[11] States attach a variety of constitutional labels to sheriffs. In Texas, Louisiana, and Maryland, elected county sheriffs are part of the state judicial branch. Tex. Const. art. V, § 23; La. Const. art. V, § 27 (for "parish" sheriffs); Md. Const. art. IV, § 44. In Indiana, elected county sheriffs are part of the "administrative" branch. Ind. Const. art. VI, § 2. In other states, such as Kansas, elected county sheriffs are wholly the creation of the legislature, having no constitutional status whatsoever. Kan. Const. art. IX, § 2. These labels are not dispositive for § 1983 purposes. For example, while sheriffs in some states are labeled as part of the judicial branch by their state constitutions, no one could plausibly claim that such a label entitles them to judicial immunity under § 1983.

policymaker where "plaintiff made no effort to show that the sheriff is a policy-making official of the county government"). *See also Soderbeck v. Burnett County*, 821 F.2d 446, 452 (7th Cir. 1987) (refusing to consider such evidence newly offered by the plaintiff because of the "doctrine of the law of the case"). Thus, in *Soderbeck*, the court accepted the county's liability defense because the plaintiff did not introduce any evidence of the sheriff's actual activities.

D. Imposing Liability On Monroe County Is Consistent With The Basis For Municipal Liability Articulated In *Monell*, As Well As With Principles Of County Governance Long Recognized By The Court.

Respondent has argued (Br. in Opp. 25) that holding Monroe County liable for the acts of its elected sheriff would be inconsistent with this Court's decision in *Monell*. According to respondent, the Court in *Monell* based its holding on the fact that municipalities are organized as corporations under state law, and on the recognition that by 1871 corporations (including municipal corporations) generally were treated as "persons" for purposes of statutory analysis. (Br. in Opp. 19 (citing *Monell*, 436 U.S. at 687-89)).

A "corporation," according to respondent, "has a single governing board that controls its operations and either sets its 'policies' or delegates that function to the officers." *Id.* As a consequence, respondent maintains, it is "difficult to imagine how a single corporation could include both a governing board and a separate official [the sheriff] vested with unchecked authority to set corporate policy." *Id.* at 20. Respondent further argues that "Monroe County as a municipal corporation (or the Monroe County Commission as its governing body)," could not possibly have *caused* the constitutional tort, as *Monell* requires, because it never "adopted or ratified a law enforcement policy that caused the

alleged violations of petitioner's constitutional rights." *Id.* at 21.

Respondent's argument reads into *Monell* an unrealistically narrow view of local government, under which final policy is made only by legislative bodies such as county commissions. Yet in both *Monell*, 436 U.S. at 694 (by noting that local officials other than "lawmakers" can make policy), and in *Jett*, 491 U.S. at 737 (by stating that officials other than "governmental bodies" can make policy), the Court rejected the idea that county policy can be made only by county commissions. Many local governments divide final policymaking authority between executive officials and legislative bodies, with executive officials setting final policy in some areas and legislative officials setting final policy in others. If respondent's view were correct, scores of lower court decisions imposing liability on county officials would be wrong.

Monell also states that "municipal corporations" in 1871 were "included within the phrase '*bodies politic* and corporate.'" *Id. at 688* (emphasis added); *see also id.* at 688 n.51 (citing *United States v. Maurice*, 2 Brock. 96, 109 (CC Va. 1823) (Marshall, C. J.) ("The United States is a government, and, consequently, a *body politic* and corporate.") (emphasis added). Sheriffs and other county executive officials derive their authority from the body politic of the county. Not every county policy — just as not every United States government policy — need be adopted or ratified by a legislative body to be final. The Court has never before viewed county governments through such a one-dimensional lens, nor is there reason to begin now.

Under Section 1983, the inquiry this Court has prescribed is one that looks to whether an official's "acts may fairly be said to represent official policy" for the county. *Monell*, 436

U.S. at 694. In this case, it is clear that the sheriff's acts represent law enforcement policy for Monroe County.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, NY 10036
(212) 994-9800

Paul C. Saunders, Co-Chair
Marc L. Fleischaker, Co-Chair
Norman Redlich, Trustee
Barbara R. Arnwine
Thomas J. Henderson
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G St., N.W., Suite 400
Washington, DC 20005
(202) 662-8600

Mitchell F. Dolin*
Robert A. Long, Jr.
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, DC 20044-7566
(202) 662-6000

Counsel for the American Civil Liberties Union and the Lawyers' Committee for Civil Rights Under Law

* Counsel of Record

January 1997